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Civil Code and Related Subjects: Mineral Rights

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MINERAL RIGHTS

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SERVITUDE

In *Grayson v. Lyons, Prentiss & McCord*,[1] plaintiff sought injunctive relief and damages for the building of a road with ditches across his land to effect contact with a well site upon land adjoining his with which his land had been pooled by the Conservation Commissioner's order. He had not been consulted as to the road's location or construction. He was, however, receiving a share of the oil produced. The district court's judgment refusing injunction but awarding $357.00 in damages was affirmed by the Supreme Court. As an equitable matter, the decision would seem to be correct. Since the plaintiff was accepting a share of production from the well, he might well be said to have been estopped to complain regarding a road to the well which was necessary to its operation. This criteria was not stated, however, if it be the secret of the decision. The rationale of the judgment does not clearly emerge. The confusing part lies in the apparent dealing with two servitudes, one a mineral servitude and the other that of passage, both discontinuous, requiring title, and subject to loss by non-user of ten years.

The court devoted some discussion to the mineral servitude which burdened the land when plaintiff bought it in 1936. However, the facts, perhaps incomplete, indicate no use of this servitude until 1950 and unitization did not occur until 1951. Certainly the principle, that upon a grant of a servitude, such reasonable appurtenances as are necessary to its effective use go with it, is well grounded by Code, jurisprudence, and common sense. Thus, if the mineral servitude burdening plaintiff's land at the time of his acquisition had not been lost by prescription, there would seem to have been no issue. If it had been lost, obviously any appurtenances would have fallen with it.

A servitude of passage in the roadway seemed to have been

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1. 226 La. 462, 76 So.2d 531 (1954). This case and the others discussed in this section of the Symposium were reported by the writer in 3 *Oil and Gas Reporter* (1954) and 4 *Oil and Gas Reporter* (1955), sponsored by the Southwestern Legal Foundation of Dallas, Texas, published by Matthew Bender and Company. Permission has been granted by Matthew Bender and Company to use portions of that material here.

kept alive by user but the road's deviation caused by defendants during their repairs was upon plaintiff's land and he had not granted its passage. If the mineral servitude upon plaintiff's lands had expired and he had granted no servitude of passage, then it would appear that the plea for injunction should have been honored. The words of the opinion suggest, however, that the mineral servitude was still in existence by undisclosed means and thus it is puzzling as to why damages were due as the new road seemed to have been constructed in a reasonable fashion and without unnecessary inconvenience.

In *Huckabay v. The Texas Co.*[2] owners of land and of one-eighth of minerals, not being parties to a recorded lease, sued lessee owners of the servitude who were entitled to seven-eighths of minerals, for one-eighth of production. The lessees admitted the plaintiffs' right but insisted that they should pay their proportionate share of the cost of exploration and production. Reversing the decision of the court of appeal, the Supreme Court held that the lessee's position was correct.

That a servitude owner's right to search is absolute and separate and apart from that belonging to any other servitude owner or of the landowner, regardless of what fractional benefits of the several rights to search may be, is undoubtedly correct. Certainly no bad faith may be attributed to proper exercise of a legal right. The principle of unjust enrichment is indisputable. The approach to or appreciation of the facts bearing upon the faith of the lessee, however, taken by the Supreme Court seems to vary from that of the court of appeal.[3] The latter court apparently was much impressed by the earnest efforts of the plaintiffs, properly implemented, to become parties to the lease given by the servitude owners with title to seven-eighths of the benefits of the search by themselves or their lessee. The analogy to rights of a co-owner of land or lease against his non-consenting co-owner is interesting but fails to point out that the right to partition is ever present in those cases. Obviously, if a co-owner stands idly by and does not exercise his right to stop actions which he does not approve, he should not share in benefits without proper contribution to their acquisition.

Since separate servitude owners and landowners are not co-

2. 227 La. 191, 78 So.2d 829 (1955).
3. 73 So.2d 321 (La. App. 1954); See 3 OIL AND GAS REPORTER 1889 (1954).

owners and therefore the right of partition does not lie, there would appear to be no relief in cases of search by one considered inadvisable by others. Had the owners of but one-eighth benefits been unreasonable, *i.e.*, had refused to sign an acceptable lease or had as landowners, purported to wait out the lapse of the servitude, the equities of the searchers would be more convincing. On the other hand, if every reasonable effort had been made by the plaintiffs to become signatories of the lease desired by the servitude owners and were refused and ignored by the lessee, as the lower court seemed to find, then the plight of a small benefit owner would appear to be rather desperate and the unjust enrichment doctrine applied to the wrong party.

In *Perkins v. Long-Bell Petroleum Co.*[4] suit was filed by a landowner under R.S. 30:101 to clear title of a mineral servitude. The servitude had not been used for a period of ten years from date of grant. The main defenses were that the servitude's term had been lengthened by virtue of an obstacle to user, namely the filing of suit, and that the suit in question had the effect of interrupting the running of prescription. The court found that no obstacle had been raised as the landowner had never refused access and, indeed, had signed a lease with defendant's lessee specifying intent to facilitate the development of the property. It was also found that the filing of the suit did not interrupt prescription as the article cited by the defendant had nothing to do with servitude. Attorneys' fees under the statute were not allowed as there was a bona fide dispute.

The court's firm statements regarding the plea of obstacle would seem to be well supported by the facts. Since the litigants had subscribed to a lease that development might not be hindered, obviously all parties were safeguarded whatever the outcome of the suit, when title to benefits would be decided. The decision in no case can be said to indicate that, under a different set of facts, suit might not result in presenting an obstacle. The court's explanation of the inapplicability of the provision on interruption of prescription by suit to servitudes is clear and satisfactory. Certainly, an intolerable result would have resulted had every suit to settle ownership of a mineral servitude been found to have resulted in a new ten-year period for the servitude.

The court again emphasizes the fundamental distinction be-

4. 227 La. 1044, 81 So.2d 389 (1955).

tween lease and servitude. The cases on *extension* of a lease because of unsuccessful suit by a lessor are clearly distinguishable from the provisions considered in the instant case.

Obviously, the court decided the question of "bona fide dispute" under the statute providing for procedures to erase a servitude from the record. The lower court was sustained in finding good faith and thus attorney fees were not assessed though there were none too subtle suggestions in the body of the opinion that the defense was motivated by production.

Lease

A slander of title action failed in *Wilson v. The California Co.*[5] for lack of proof. Recorded documents evidencing various contracts were offered as proof since they referred to lands of the plaintiff burdened only by a servitude of passage belonging to the United States Government. Mention of these tracts was found to have been for purposes of identification only without reference to ownership and hence were not slander of title. To effect cancellation of a void lease from the record, plaintiff should have proceeded otherwise.

In *Wilcox v. Shell Oil Co.*[6] lessor sought to cancel a lease for failure to drill or pay. The defense was that the operating agreement under the terms of the lease continued the lease in force by virtue of a producing well in a unit including part of the lessor's property but not located on his land. The Supreme Court held that inasmuch as the producing well was in existence before the unit was formed, the promise to drill on the tract or pay for deferment of operations had not been fulfilled.

The terms of the lease in question were long and complicated and would appear to have been most carefully drawn in the lessee's interest. It was clear, however, that the producer came in when no unit existed either under the Conservation Department's order or under a permissive clause of the lease contract. The Commissioner's order covered two shallower sands but not the deep one from which production was secured. Thus, the drill or pay clause was breached and the lease cancelled. Attorney's fees were payable by the lessee under R.S. 30:102 as the statutory requirements for notice, etc., had been met by the lessor. The

5. 226 La. 144, 75 So.2d 224 (1954).
6. 226 La. 417, 76 So.2d 416 (1954).

signing of a division order in connection with production from the well drilled before unitization was not a ratification of lessee's pooling arrangements as the lessors were unaware of the pooling when they signed. No estoppel was created for the same reason, even as to one of the plaintiffs who had cashed four royalty checks. The fact that the lessee silently moved to effect a pooling, recording the document on the final day before a delay rental for failure to drill was due, seemed rightfully to have influenced the court's approach.

In *Dixon v. American Liberty Oil Co.*[7] plaintiffs brought jactitation suits claiming possession of minerals by virtue of their possession of the surface and maintaining that defendants were slandering their title by recording certain deeds and mineral leases and by extracting oil from their tracts under a spacing order of the Commissioner. At the time of the suit plaintiffs had physically possessed the land for over the thirty years necessary for bad faith acquisition by prescription. The defendants, record title owners, had granted a lease after the thirty-year period had run. Wells had been drilled but not upon the plaintiffs' claimed lands. However, these lands became a part of the drilling units ordered by the Commissioner before completion of the wells and were being drained. Thus the defendants asserted possession of the minerals. It was held that the plaintiffs were in possession of the minerals as well as the surface and hence could bring a suit in jactitation.

This decision is of unusual importance because of its bearing on several basic elements of mineral law. The case of *Lenard v. Shell Oil Co.*[8] held that an owner of land whose title clearly showed an outstanding mineral servitude was not in possession of the minerals under his land while the servitude was in possession of others by virtue of its exercise on land outside of the tract claimed under ten years good faith possession but burdened by the single servitude covering all the land. This holding was reaffirmed by the instant decision. The important distinction was that "a lease is not a mineral servitude" but merely a contract, not attached to the land itself. Act 205 of 1938 appeared to have been an attempt to deny this most important distinction but was held to have but procedural effect. Act 6 of the Second Extra Session of 1950 added the word "substantive," which indicated

7. 226 La. 911, 77 So.2d 533 (1954).
8. 211 La. 265, 29 So.2d 844 (1947).

displeasure with the decisions. This legislation[9] was honored in the instant case but was held not to affect the important distinction between servitude and lease, though they were both "real rights." The dissenting justice apparently felt that since separate possession of land and minerals under servitude were recognized, the same should be true under lease. Since the slander of title was continuing, the one-year prescription relating to possessory actions did not apply. Withdrawal of oil from under the land under the Commissioner's order was not a physical disturbance of the surface holder within the meaning of the law dealing with possession.

A suit for $372,000 damages for failure to produce was brought in *Ludeau v. Continental Oil Co.*,[10] alleging abandonment with intent to defraud. Several contracts were involved, the critical one having provided for an option to drill on certain acreage which if exercised with production resulting would entitle plaintiffs to one-half of seven-eighths, less costs. The option was exercised and, after two unsuccessful attempts and an expenditure of over $200,000, operations were discontinued. Conflicting testimony of geologists was heard. Plaintiff's major point seemed to be that there were presently two hundred producing wells within a radius of two miles. The burden of proof of fraud or failure to diligently attempt to produce was not sustained.

The allegations of the plaintiff appear to be rather novel. The court remarked that defendants had not obligated themselves to *produce* oil. There was a suggestion in the opinion that had present day advanced methods obtained at the date of the attempt to produce, that plaintiff's suit might have been successful. Hindsight observations on defendant's methods obviously were not impressive. Moreover, the court remarked that "speculation and uncertainty are inherent in all drilling operations."[11] The most convincing testimony of defendants would appear to have been the amount of money spent in their unsuccessful efforts. The fact that minerals were being extracted from the twenty acres in question through nearby wells was apparently not proved, though the twenty-acre spacing order of the Commissioner of Conservation seems pertinent and impressive.

9. LA. R.S. 9:1105 (1950).
10. 226 La. 1053, 78 So.2d 170 (1955).
11. *Id.* at 1059, 78 So.2d at 172.

In *Wier v. Grubb*[12] a sublessor sought cancellation because of failure to properly develop the area covered by the sublease, after oil was discovered in paying quantities as provided in the lease.

The rule of the Louisiana Code of Practice[13] regarding time for filing an answer to an appeal was applied. It was firmly stated to be that filing must occur at least three days before the date fixed for argument without regard to holidays and without count of either the day of filing or that of argument.

On the merits, three producers and one dry well in a relatively small area compared to the acreage of the sublease were held not to constitute diligent development.[14] Lessee had been placed in formal default, which was ignored. R.S. 30:102 in regard to attorneys' fees was applied and an award of $3,000 made.

The court clearly stated that the question of diligent development is so largely one of fact that no set rule can be adopted and a determination must be reached in individual cases. The plea that economic loss would result by continued drilling was no justification as ready relief was available by yielding the area to the lessor, who indeed, had made repeated demands before formal placing in default.

Reiteration in the instant case of the implied obligation to develop every part of the property occurs as does the rule of profitability to both parties. The statutory protection to a lessor when forced to sue seemed particularly valuable in this case as a lessor might well be at the mercy of a lessee determined to hold without further development because of the heavy costs involved. The controversy in the instant case reached the Supreme Court before in 1949.[15] The statute then was construed to apply to subleases as well as to leases, as a sublessor assumes all the rights and obligations of a lessor. It is heartening to observe the court's attitude in the instant and other recent cases toward a lessee who, while refusing to further develop, wishes to hold a lease indefinitely for purposes which could only be profitable to himself.

In *Texas Co. v. McDonald*[16] a concursus proceeding was brought by an oil company to determine ownership of royalties.

12. 82 So.2d 1 (La. 1955).
13. LA. CODE OF PRACTICE art. 890 (1870).
14. See Wier v. Grubb, 215 La. 967, 41 So.2d 846 (1949).
15. *Ibid.*
16. 82 So.2d 37 (La. 1955).

Two chains of title were involved and uncertainty of title was known. Many deals were made. Finally a compromise was reached. The defense was that the compromise was procured by threat of a putting in default for failure to drill offset wells when it was legally impossible to do so. The court held that there was no duress in threatening to do that which is provided for by law.

The many transactions involved made it clear that claimants were unsure of title to an area of great desirability. Certainly a legal right to place in default for failure to carry out an express provision in a lease exists. It appears that the court was correct in finding that the compromise was a mere "balancing the damage of losing" against the "hope of gaining."[17]

17. See LA. CIVIL CODE art. 3071 (1870).